UNIVERSITY OF TORONTO
FACULTY OF LAW

Materials for
The Legal Process, Winter 2022
Volume 1

Faculty of Law, University of Toronto
Professor Hamish Stewart

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A. The Trial

1. Overview of the Trial Process

In this overview, I use the letters P and D to represent the plaintiff and defendant in civil cases, and the prosecution and defendant (accused) in criminal cases.

1. Pleadings

All legal proceedings begin with a pleading, that is, a document outlining P's claim against D. In civil proceedings in Ontario, this document is called a statement of claim or a notice of application. In this course, we will be concerned principally with civil actions, which aways begin with a statement of claim. In criminal proceedings, this document is called an indictment (in proceedings by way of indictment) or an information (in summary conviction proceedings).

2. Pre-trial motions

In both civil and criminal proceedings, the parties can bring motions before a judge to resolve issues that need to be determined before trial. Most of the material in this course concerns pre-trial motions in civil matters. Depending on the nature of the motion, evidence may or may not be required. If evidence is required, the motion is conducted in a manner similar to a trial (as described below).

3. The Functional Division of the Court

In any trial, there may be both questions of law and factual questions at issue. The trial court is functionally divided between the trier of law—that is, the person who decides the legal issues—and the trier of fact—that is, the person who decides the factual questions.

- The trier of law: the trial judge is always the trier of law. The trier of law makes legal rulings, including rulings as to the admissibility and permissible use of evidence and rulings on any procedural issues that arise during the trial.
- The trier of fact: the jury (12 members in criminal cases, 6 members in civil cases in Ontario) or, if there is no jury, the trial judge. The trier of fact determines the facts and applies the law to the facts.

In the classic common law model, at the outset of the trial, the court knows nothing about the case, apart from the allegations in the pleadings. All the evidence comes from the parties to the case; all of the factual findings must be based on the evidence (or on the lack of evidence).

4. The Voir Dire

The purpose of a *voir dire* is to resolve a procedural or evidentiary issue that arises before or during the trial. For example, if one of the parties objects to the admission of evidence proffered by another party, the trial judge may hold a *voir dire* to decide that issue. If the court is composed of a judge and jury, the *voir dire* is conducted in the absence of the jury. Witnesses are called and questioned in a *voir dire* in the same manner as in the trial itself. In the *voir dire*, the trial judge acts as trier of fact. On a *voir dire* to determine the admissibility of evidence, the factual issue is whether the conditions for the receipt of the disputed evidence are satisfied; the burden of proof is usually on the proponent of the evidence; and the quantum of proof is usually on a balance of probabilities.

5. The Trial

(a) P's case in chief: counsel for P calls witnesses; each witness swears or affirms to tell the truth.

- examination in chief: counsel for P asks questions; the witness answers
- cross-examination: counsel for D asks questions; the witness answers
- re-examination: counsel for P asks questions, but only to explore matters that arose in cross-examination
- the trial judge may ask a few questions, especially if there is no jury
- the jury is rarely permitted to ask questions
- either counsel may object to questions asked by opposing counsel; the trial judge rules on the objection

(b) At the end of P's case, D may move for directed verdict of acquittal (criminal cases: see p. 64 below) or a non-suit (civil cases; see p. 48 below). The basis for this motion is the claim that P's evidence, even if accepted in every detail by the trier of fact, does not established P's case, usually because there is no evidence capable of proving an element of the cause of action or the charge. If there is no motion of this kind, or if the motion is dismissed, then go to (c).

(c) D's case in chief: call witnesses; each witness swears, etc.

Note that D is not required to call any evidence; instead, D may argue that P has not discharged its burden of proof. This tactic is common in criminal cases but rare in civil cases.

If D does call evidence, then D's case is presented in the same way as P's case:

- examination in chief: counsel for D asks questions; the witness answers
- cross-examination: counsel for P asks questions; the witness answers
- re-examination: counsel for D asks questions, but only to explore matters that arose in cross-examination
- the trial judge may ask a few questions, especially if there is no jury
- the jury is rarely permitted to ask questions
- either counsel may object to questions asked by opposing counsel; the trial judge rules on the objection

(d) P's reply or rebuttal (rarely permitted); followed by D's surreply or surrebuttal (very rarely permitted): witnesses are called and questioned, as during the parties' cases in chief.

(e) When all the evidence has been heard, counsel for each party addresses the trier of fact.

(f) determining the facts:

In a jury trial, the trial judge instructs (or charges) the jury on various matter, including:

- how the evidence should be approached;
- the burden and quantum of proof;
- the inferences that may be permissibly be drawn from the evidence;
- (within limits) the judge's opinions about the evidence;
- how the evidence relates to each party's theory of the case;
- the applicable law.

The jury then retires to a private room.

- Counsel for either side may object to the charge to the jury; if the objection is successful, the trial judge will have the jury brought back to the courtroom to be reinstructed; they will then return to the jury room to continue their deliberations.
- While considering the evidence, the jury may send written questions to the trial judge; the trial judge will often seek submissions from counsel about how these questions should be answered, and will then give the jury his or her answer

The jury returns to court to render its verdict

- civil cases: jury may find liability and assess damages, and usually does so in the form of answers to a series of questions posed by the trial judge
- criminal cases: the only possible jury verdicts are guilty (of the offence charged or of an included offence), not guilty, or criminally responsible on account of mental disorder (if that is in issue)

- Note that juries do not give reasons for their decisions.

In a judge-alone trial, the trial judge gives reasons for judgment, orally or in writing, in which he or she considers the evidence, finds facts, explains how those facts were found, reviews the law, and applies the law to the facts. There is an extensive body of case law on the trial judge's duty to give reasons for judgment, beginning with *R. v. Sheppard*, 2002 SCC 26; see also *H.(F.) v. MacDougall* beginning on p. 51 below).

(g) the order: each trial ends with a formal order

- civil cases: the trial judge makes order giving judgment for the plaintiff or dismissing the action, and makes an award of costs
- criminal cases:
  - the trier of fact acquits accused or finds accused guilty
  - the trial judge releases accused (if acquitted) or sentences accused (if found guilty)

Once the formal order is made, the trial court is said to be *functus officio*—that is, the trial court has no jurisdiction to reconsider its decision. (For a recent discussion of the application of this doctrine to a decision of a court of appeal, see *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33.) Nevertheless, the trial judge has a very limited power to correct obvious facial defects in the order (for a discussion of the application of this power to a jury verdict that was incorrectly heard in court, see *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857) and a broader power concerning enforcement of the court's order (for a discussion of this issue in a *Charter* context, see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3). Apart from those powers, once the formal order is made, any further proceedings must be by way of a motion in the trial court to enforce the order, or by way of appeal (if available) to a higher court.

2. The Civil Trial

a. Motion for a Nonsuit

At the close of the plaintiff's case, the defendant may move for a non-suit. As noted above, on such a motion, the issue is whether the plaintiff's evidence, if fully accepted, is capable of establishing the cause of action; if not, the motion should be granted, but if so, the motion should be dismissed. In some provinces, the rules of civil procedure govern this type of motion. In Ontario, the motion for a non-suit is not mentioned in the rules but remains available at common law. In some jurisdictions, the defendant must choose between moving for a non-suit and calling evidence. In Ontario, the proper procedure is for the trial judge to reserve on the motion for a non-suit until the defendant's evidence has been heard, at which point the plaintiff may choose to renew its motion. The motion for a non-suit has become rare and there is a serious question as to whether it has much value in contemporary civil litigation.

In *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561, the Ontario Court of Appeal considered some aspects of

c. The Civil Jury

In civil proceedings in Canada, most cases are tried by a judge sitting alone, but trial by jury is not uncommon. See Rule 47 of the Ontario Rules of Civil Procedure. Rule 47.01 enables either party, at any time before the close of the pleadings, to deliver a notice requiring the matter to be tried by a jury. Rule 47.02 provides that, on motion, a judge can strike the jury notice and require the matter to be tried by judge alone.

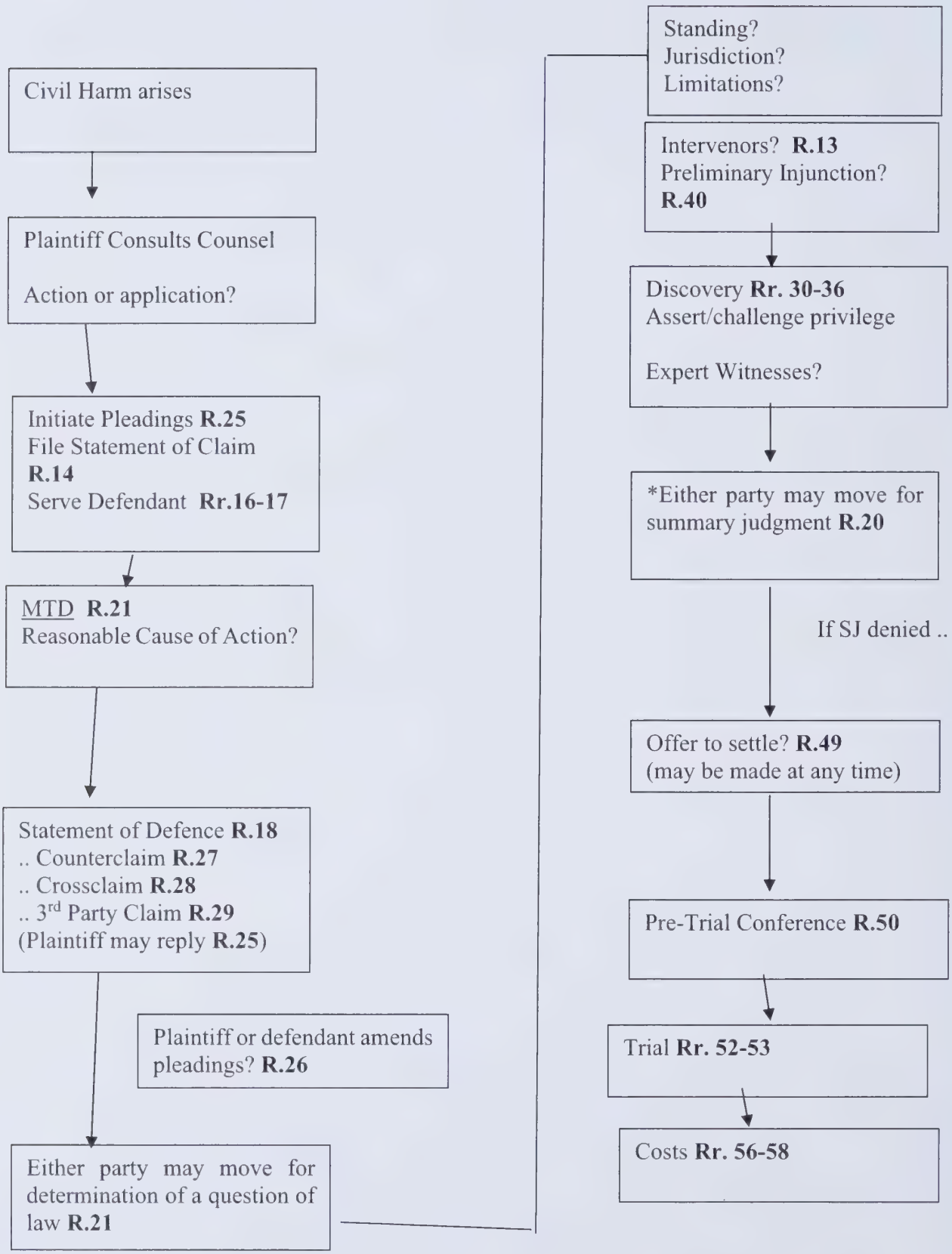
For a case concerning the trial judge's discretion to strike the jury notice once the trial had already begun, see *Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241.

III. Commencement of an Action

Please read the following Rules of Civil Procedure:

- Rule 1
- Rule 2
- Rule 9
- Rule 14

Civil Litigation Flow Chart
(courtesy of Prof. Simon Stern and Nancy Bueler)



D. Commencement of Criminal Proceedings

There are two modes of proceeding in Canadian criminal law: proceedings by way of indictment and proceedings by way of summary conviction. The most serious offences in the *Criminal Code* can be proceeded with only by indictment, and some of the minor offences can be proceeded with only summarily; but many offences in the *Code* are so-called "hybrid" or "Crown-option" offences, where the Crown elects the mode of proceeding. Theft under $5,000 and sexual assault are two hybrid offences that are frequently prosecuted by the summary procedure. Until the Crown elects, proceedings in relation to a hybrid offence are deemed to be by way of indictment.

Generally speaking, in proceedings by way of indictment, the accused can choose whether or not to be tried in the provincial court or the superior court (but see *Code*, s. 553, giving the provincial court "absolute jurisdiction" over a small group of offences, notably including theft under $5,000).

If the accused chooses trial in the superior court, he can choose whether to be tried by judge and jury or by judge alone, and for offences punishable by 14 years' imprisonment or more, whether to have a preliminary inquiry in provincial court first. For the most serious offences, the trial must be held in superior court with judge and jury unless the Crown and the defence agree to a judge-alone trial (see *Code*, s. 469).

If the accused chooses trial in provincial court, there is no preliminary inquiry and no jury.

In Quebec, regardless of whether the proceedings are by way of indictment or by wat of summary conviction, all non-jury trials are held in the provincial court, the Cour du Québec: see *Code*, s. 552(b).

In proceedings by way of summary conviction, there is no preliminary inquiry, and normally the trial will be held in the provincial court without a jury. However, superior courts also have jurisdiction over most summary conviction offences, so if an accused is charged with both indictable and summary conviction offences, it is possible for the summary offences to be tried in superior court together with the indictable offences.

By default, the maximum sentence for an offence prosecuted by way of summary conviction is two years less a day (*Code*, s. 787(1); until 2019, this default maximum was 6 months). Some summary conviction offences have shorter maximum periods of imprisonment, and some are punishable by a term of imprisonment "not exceeding two years", but unless I have missed something, none is publishable by a term of more than two years.

The maximum sentence for an offence prosecuted by way of indictment depends on the offence but is normally 2 years, 5 years, 14 years, or life.

All offences created under provincial legislation are prosecuted by way of summary conviction.

Prosecutions of most *Criminal Code* are normally conducted by provincial Crown attorneys. Prosecutions of offences under other federal legislation and of terrorism offences are conducted by the federal Public Prosecution Service of Canada. (See also IV.G.1 below.)

1. Pleadings

The charging document is known as an information or indictment. The information or indictment can allege more than one offence; each alleged offence is referred to as a "count" in the information or indictment.

Proceedings can be commenced privately by anyone by way of information (*Code*, s. 504 and Form 2) or by the Crown on an indictment (*Code*, Form 4). The Crown has unfettered discretion to assume carriage of a private prosecution, and usually does.

Each count should briefly state the Crown's allegation against the accused. Each count should relate to "a single transaction" (*Code*, s. 581(1)), a concept which can be difficult to apply where the conduct alleged spans a considerable period of time. The wording of an indictment or information is normally far less detailed than a statement of claim in civil proceedings; nevertheless, like a statement of claim, each count is supposed to help define the scope of the case by stating the offence charged and, briefly, the facts that would have to be proved to prove the offence (s. 581(2)); it should enable the accused to identify the "transaction" in question (s. 581(3)).

In response to the allegation, the accused normally pleads guilty or not guilty. A plea of guilty is a formal admission that the Crown can prove all the facts necessary to constitute the offence charged. (On the conditions for the validity of a guilty plea, see most recently *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696.) A plea of not guilty is a general denial of the offence. In contrast to the defendant in a civil action, the accused is not required to specify which facts he admits and which facts he says the Crown cannot prove. Nevertheless, it is common at the outset of a criminal trial for the accused to formally admit facts that he does not intend to dispute (*e.g.*, if identity is not going to be in issue at trial, the accused will usually admit that he is the person alleged to have committed the crime). Section 655 of the *Code* provides for such admissions.

As in the case in civil proceedings, in criminal proceedings the wording of the counts in the information or indictment can be amended at any stage provided the amendment does not prejudice the accused.

2. Joinder and Severance

A charge can be laid against more than one person. But accused persons who are jointly charged can apply to be tried separately if it would be unfair for them to be tried together (this procedure is known as "severance").

There is no procedure by which the accused can join other persons to the criminal trial. Put another way, in criminal procedure, there no equivalent to Rule 29 of the Rules of Civil Procedure, by which persons not originally involved can be added as third parties (or Rule 5.03). If the accused's theory of the case is that the crime was committed by someone else, he can lead evidence to that effect, but he cannot have that other person joined as a co-accused (and even if he could, it might not be to his advantage – why not?).

3. Intervention

In criminal proceedings, there is no possibility of intervention as a party.

Intervention as a friend of the court is possible in criminal cases and is not unusual in cases involving significant issues of statutory interpretation or constitutional validity. It is much more common for intervenors to participate on appeal than at trial. In *R. v. Mabior*, 2012 SCC 47, for example, which involved important issues of statutory interpretation and public policy, there were no intervenors at trial, there was one intervenor on the appeal to the Manitoba Court of Appeal, and there were 11 intervenors on the appeal to the Supreme Court of Canada.

It is not appropriate for intervenors to make submissions on the accused's guilt or innocence.

IV. Determination of an Action Without Reaching the Merits

In this part of the course, we consider a number of reasons why a claim might be dismissed without consideration of its merits: the defendant may argue that the plaintiff lacks standing to make the claim (IV.A.), that the claim is not suitable for decision by a court (IV.B), that the court lacks jurisdiction over the claim (IV.C), that the claim has become moot (IV.D), that the claim was not brought in a timely manner (IV.E), or that the claim has already been decided (IV.F). If any of these arguments succeeds, the plaintiff's claim will be dismissed without consideration of its merits.

Please be attentive to whether the procedure for the defendant's argument was a Rule 21-type motion or an issue raised in the pleadings that was decided on a motion for summary judgment or at trial. Why was the particular procedure appropriate in each case?

In part IV.G, we briefly consider some of the ways in which a criminal proceeding can be determined without reaching the merits.

A. Standing

In order to make a claim, a plaintiff must have "standing". If a plaintiff does not have standing, their action should be dismissed without consideration of its merits. The plaintiff's standing may be characterized as "private", where the plaintiff's own interests are sufficiently affected by the defendant's conduct for the plaintiff to bring the action in their own right, or as "public", where the plaintiff's interests are not affected by the defendant's conduct but the court permits the plaintiff to raise issues that might otherwise be difficult to litigate.

1. Standing in Private Law Matters

In private law matters, it can be difficult to distinguish the question whether the plaintiff has standing from questions such as whether the plaintiff has stated a reasonable cause of action or whether the plaintiff's action succeeds on its merits. Consider, for example, *Lukács v. Doering et al.*, 2011 MBQB 203. The plaintiff Lukács brought an application for a declaration that a student who had received his Ph.D. in Mathematics from the University of Manitoba had not in fact fulfilled the requirements of the Ph.D. program. The defendants moved to dismiss the plaintiff's application. McCawley J. framed the defendant's motion as "a motion for an order that a notice of application … be struck on the grounds that Dr. Lukács does not have standing to seek the relief claimed and therefore the application fails to disclose a reasonable cause of action." She went on to conclude that the plaintiff indeed had no standing; she therefore granted the defendants' motion and dismissed the application. What is the difference (if any) between holding that the plaintiff had no cause of action and holding that the plaintiff had no standing to challenge the University's decision to award the student his Ph.D.?

For a further example, consider the following case. Was the problem with the plaintiff's claim best characterized as one of standing or as something else? Could the defendant have brought a motion under Rule 21(1)(*b*) to strike the plaintiff's claim as disclosing no cause of action? What reasons might there have been for the dispute to have reached the stage of summary judgment?

G. Notes on Criminal Proceedings

1. Standing

The vast majority of prosecutions are brought by the Crown. But anyone can commence criminal proceedings and, in principle, anyone can prosecute an offence. (For an introduction to this procedure, see *R. v. McHale*, 2010 ONCA 361, at paras. 4-12.) However, the Crown has a very broad discretion to intervene and stay a private prosecution at any time after the charge has been laid (see *Criminal Code*, ss. 579, 579.01, and 579.1; for an example, see *R. v. Glegg*, 2021 ONCA 100). The Crown can then choose whether or not to commence proceedings itself. (For an example of the Crown staying a private prosecution and then laying charges in its own right, see *R. v. Executive Flight Centre Fuel*, 2019 BCCA 139.)

Regardless of the identity of the prosecutor (public or private), proceedings in relation to certain offences cannot be commenced without the consent of the Attorney General: see, for example, *Criminal Code*, s. 7(7), concerning offences allegedly committed by non-citizens aboard aircraft; s. 319(6), concerning the offence of wilful promotion of hatred against an identifiable group; *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 9(3).

Which Crown? The prosecution of provincial offences is the responsibility of the provincial Crowns. Most, but not all, offences under the *Criminal Code* are also prosecuted by the provincial Crowns. See the definition of "Attorney General" in s. 2 of the *Code*. Other federal offences (*e.g.*, offences under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, or the *Aeronautics Act*, R.S.C. 1985, c. A-2) are prosecuted by the federal Crown. However, the precise constitutional basis for this division of labour is not entirely clear. Does the prosecution of federal offences fall under s. 91(27) of the *Constitution Act, 1867* (criminal law and procedure) or under the head of federal power that is the basis for the statute in question? Or does it fall under s. 92(14) (the administration of justice in the province)? It is reasonably clear that the federal Crown has the authority to prosecute federal offences whose validity depends on a head of power *other than* the criminal law power (see *R. v. Hauser*, [1979] 1 S.C.R. 984; *R. v. Wetmore*, [1983] 2 S.C.R. 161). As noted, the provincial Crowns normally prosecute *Criminal Code* offences, but it is not entirely clear whether this power is delegated from the federal Crown (as suggested by *Canada (A.G.) v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206) or whether it is founded on s. 92(14) of the *Constitution Act, 1867* (as suggested in *Hauser*, *supra*). The apparently undoubted power of the federal Crown to prosecute terrorism offences under the *Criminal Code* would tend to support the former view.

The accused always has standing to challenge the constitutional validity of the legislation under which they were charged: "Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid." *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 313-4. This standing rule applies even if the legislation, as applied to the particular accused person, would be constitutionally valid: see, for example, *Big M* (a corporation was permitted to challenge an offence definition based on its impact on freedom of religion, even though corporations do not have freedom of religion); *R. v. Heywood*, [1994] 3 S.C.R. 761 (an

accused challenged an offence definition on the ground of overbreadth, even though he would likely have been guilty under a constitutionally sufficient version of the statute.

In a proceeding to determine the validity of the offence charged, by virtue of statute, normally both the federal and the relevant provincial Attorneys General have standing to appear for the purpose of making arguments concerning the constitutionality of the legislation.

2. Justiciability

Criminal charges are always justiciable (why?).

3. Jurisdiction

In criminal proceedings, we distinguish between jurisdiction over the offence, jurisdiction over the person, and territorial jurisdiction. Jurisdiction over the offence is statutory and depends on which court (provincial or superior) has the authority, under the *Criminal Code*, to try the offence. Jurisdiction over the person depends on process having been properly issued requiring the accused to attend court at a certain time and place.

Territorial jurisdiction is also essentially statutory. Normally, an offence should be tried in the province and judicial district where it was allegedly committed (*Code*, s. 478(1)), but there are some statutory exceptions to this general rule. In addition, Canadian courts have extra-territorial jurisdiction, that is, jurisdiction over acts committed outside Canada that would constitute offences inside Canada, where the *Code* or another statute grants such jurisdiction. To take just one example among many, s. 7(2) of the *Code* grants Canadian courts jurisdiction over an offence committed outside Canada on board an aircraft in flight "if the flight terminated in Canada"; however, if the accused is a non-citizen, the Attorney General must consent to the continuance of the prosecution within 8 days of its being commenced (see *Code*, s. 7(7), and *R. c. Hoche*, 2019 QCCA 2182).

4. Mootness

"[C]riminal proceedings abate when the accused dies": *R. v. Lewis* (1997), 153 D.L.R. (4th) 184 at para. 3 (B.C.C.A.); see also *Re Cadeddu and The Queen* (1983), 4 C.C.C. (3d) 112 (Ont. C.A.). In other words, the death of the accused person renders the criminal proceedings moot. If the trial has not been completed, the trial cannot continue and no verdict can be given. If the trial has concluded and an appeal has been taken, the appeal is moot, but the appeal court retains a discretion to hear the appeal: see *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, and for a recent example of the court exercising its discretion to hear a moot appeal, *R. v. Poulin*, 2019 SCC 47.

5. Timeliness

In proceedings by way of indictment, there are no limitation periods.

Proceedings by way of summary conviction are subject to a 12-month limitation period (*Code*, s. 786(2); before 2019, the limitation period was 6 months), unless the prosecution and the defence agree. What reason might an accused person have for agreeing to waive the benefit of the limitation period for a summary conviction offence?

Section 11(*b*) of the *Charter* guarantees a person charged with an offence the right to be tried "within a reasonable time." The period of time relevant to this right begins when the charge is laid (*not* when the offence is alleged to have occurred) and ends when the trial concludes or is expected to conclude. The leading case on determining a "reasonable time" is *R. v. Jordan*, 2016 SCC 27, which sets a presumptive ceiling of 30 months for proceedings in superior courts and 18 months for proceedings in provincial courts. The remedy for a violation of the right to be tried within a reasonable time is a stay of proceedings. For a recent application of the *Jordan* principles resulting in a stay of a very serious charge, see *R. v. Thanabalasingham*, 2020 SCC 18.

How is the right to be tried within a reasonable time different from a limitation period?

6. Finality

a. The Right Against Double Jeopardy

If the accused is charged with an offence and takes the position that he has already been tried for the offence, he should enter one of the special pleas *autrefois acquit* or *autrefois convict*. The judge will then determine whether the plea applies; if so, the charge should be dismissed; if not, the accused should be called on to plead guilty or not guilty and the trial should proceed. The special pleas apply to all offences that were charged or, with proper amendments, could have been charged in "the matter on which the accused was given in charge on the former trial" (*Code*, s. 609(1)).

The right against double jeopardy is also protected by s. 11(*h*) of the *Charter*, which provides that "Any person charged with an offence has the right … if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again …"

Under s. 676(1) of the *Code*, in proceedings by way of indictment, the Crown has the right to appeal from an acquittal "on any ground of appeal that involves a question of law alone …" Is the Crown's right of appeal from acquittal consistent with the accused's *Charter* right against double jeopardy? See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 155-6.

Should the protection against double jeopardy expand beyond the *autrefois* pleas to encompass all charges that could have been laid on the facts out of which the original charge arose? Contrast *R. v. Ward*, [2002] O.J. No. 5398 (S.C.J.) (yes, *per* Nordheimer J.) with *R. v. T.G.*, 2017 ONSC 3213 (no, *per* Di Luca J.).

The accused, an R.C.M.P. officer, was alleged to have assaulted a suspect. In relation to this incident, he was charged with a "major service offence" under s. 25(*l*) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9. The maximum penalty for this offence was one year's imprisonment. The accused was tried by a senior officer, was found guilty, and was fined $300. The accused was also charged with assault under the *Criminal Code*. When he appeared in provincial court for trial, he argued that the criminal prosecution violated his *Charter* right against double jeopardy. Do you agree? See *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. In any event, was the prosecution an abuse of process?

b. Issue Estoppel

The accused can assert issue estoppel against the Crown, but the Crown cannot assert issue estoppel against the accused: See *R. v. Mahalingan*, 2008 SCC 63, and Hamish Stewart, "Issue Estoppel and Similar Facts" (2008), 53 *Crim. L.Q.* 382. So if the accused is acquitted of an offence on the merits, in subsequent proceedings, the Crown cannot allege any fact that is inconsistent with the acquittal. In contrast, it is always open to the accused to deny that he committed an offence of which he was previously convicted: see *R. v. Jesse*, 2012 SCC 21 (this was not the central issue in *Jesse*, but there would have been no issue in the case at all if the accused had not been allowed to deny committing the earlier offence).

Why the asymmetry? Should the Crown be allowed to invoke the abuse of process doctrine from *Toronto v. C.U.P.E.* to prevent the accused from contesting a previous conviction?

Suppose that in *Wigglesworth*, *supra*, the senior officer who tried the accused on the *RCMP Act* offence had acquitted him on the basis that the alleged assault was not proved beyond a reasonable doubt. In the subsequent criminal trial, could the accused have successfully argued that issue estoppel prevented the Crown from alleging that the assault occurred as described by the complainant? If not, could the accused have successfully argued that the criminal proceedings amounted to an abuse of process?